**BEFORE THE MERIT RELATIONS BOARD**

**OF THE STATE OF DELAWARE**



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| DONNA TRADER,<br><br>Employee/Grievant,<br><br>v.<br><br>DEPARTMENT OF HEALTH AND SOCIAL SERVICES,<br><br>Employer/Respondent. | ) | **DOCKET No. 07-01-379**<br><br>**DECISION AND ORDER** |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board ("the Board") at 9:30 a.m. on April 23, 2008 at the Margaret M. O'Neill Building, Suite 213, 410 Federal Street, Dover, DE 19901.

**BEFORE** Brenda J. Phillips, Chair, John F. Schmutz, Joseph D. Dillon, and Martha K. Austin, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

W. Michael Tupman, Esquire
Deputy Attorney General
Counsel to the Board

Jean Lee Turner
Administrative Assistant to the Board

Roy S. Shiels, Esquire
on behalf of Donna Trader

Kevin R. Slattery, Esquire
Deputy Attorney General
on behalf of the Department of Health and Social Services

## SUMMARY OF THE EVIDENCE

The Department of Health and Social Services ("DHSS") attached to its motion to dismiss three exhibits: (1) Letter dated August 9, 2006 from Mr. Shiels to Robert Hoffner; (2) Letter dated December 29, 2006 from Mr. Shiels to Jean Lee Turner; and (3) Letter dated August 22, 2006 from Mr. Hoffner to Mr. Shiels.

The Board did not take any testimony from witnesses but heard legal argument from counsel on the State's motion to dismiss the appeal for lack of jurisdiction.

## FINDINGS OF FACT

The basic jurisdictional facts are not in dispute. In August 2004, Donna Trader ("Trader"), a Health Program Coordinator employed by the Division of Public Health, received "verbal counselings" (to use the State's language in its motion to dismiss) about improving the productive use of her work time.

In her Step 1 grievance, Trader characterized this incident as "an unwarranted oral reprimand." At the hearing, counsel for DHSS agreed to use the term "oral" or "verbal reprimand" for the sake of legal argument because it did not make any difference for purposes of the State's motion to dismiss whether the incident was characterized as verbal counseling or an oral or verbal reprimand.

## CONCLUSIONS OF LAW

Section 5943(a) of Title 29 of the *Delaware Code* provides: "The exclusive remedy available to a classified employee for the redress of any alleged wrong, arising under a

misapplication of any provision of this chapter, the merit rules, or the Director's regulations adopted thereunder, is to file a grievance in accordance with the procedure stated in the merit rules. Standing of a classified employee to maintain a grievance shall be limited to an alleged wrong that affects his or her status in his or her present position."

Merit Rule19.0 defines a "grievance" as a "Merit employee's claim that these Rules or the Merit system statute has been violated."

Merit Rule 12.1 provides that "Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause."

Merit Rule 12.2 provides that "Employees shall receive a written reprimand where appropriate based on specified misconduct, or where a verbal reprimand has not produced the desired improvement."

The State's motion to dismiss raises two jurisdictional issues: (1) Does Trader have standing to grieve? and (2) Does Trader state a claim for an alleged violation of the Merit Rules or statutes which the Board has jurisdiction to redress?

The first issue turns on whether the oral reprimand affected Trader"s "status in her present position." 29 *Del. C.* §5943(a). Trader claims the oral reprimand affected her status in two ways: by laying a foundation for more serious discipline in the future; and by affecting her performance review one year later. The Board, however, does not have to resolve the standing issue because the Board does not believe Trader has stated a claim for a violation of the Merit statutes or Merit Rules.

Merit Rule 12.2 distinguishes between verbal and written reprimands. An employer may issue a written reprimand "based on specified misconduct, or where a verbal reprimand has not

produced the desired improvement." The issue here is whether a verbal reprimand is a "disciplinary measure" for purposes of Merit Rule 12.1 requiring the employer to have just cause. The Board does not believe that a verbal reprimand – by its nature or intent – is a disciplinary measure.

While there is no Delaware case law on point, under the federal civil rights laws the courts distinguish between verbal and written reprimands. "A formal reprimand may constitute adverse employment action but, absent evidence that it is 'anything more than mere criticism' a verbal reprimand does not." *Weigold v. ABC Appliance Co.*, 105 Fed.Appx. 702, 2004 WL 1543165, at p.5 (6th Cir., June 7, 2004) (quoting *Mylett v. City of Corpus Christi*, 47 Fed.Appx. 473, 2004 WL 962095, at p.3 (5th Cir. 2004)). *Accord Muti v. Schmidt*, 96 Fed.Appx. 69, 2004 WL 2998746, at p.5 (3rd Cir., Apr. 21, 2004) ("criticisms" and "verbal reprimands" are not adverse employment action).

By analogy, the Board construes the term "disciplinary measures" in Merit Rule 12.1 to include written but not verbal reprimands, consistent with the distinction between written and verbal reprimands in Merit Rule 12.2. There are sound public policy reasons for making this distinction. In the workplace, supervisors are called upon every day to assess the job performance of employees. Constructive criticism, in the form of verbal counseling or a verbal reprimand, is sometimes necessary to help the employee improve his or her job performance. If a verbal reprimand were subject to the Merit Rule grievance process, supervisors might hesitate to offer constructive criticism, to the detriment of the employee. Without ongoing verbal feedback from supervisors, an employee might face more serious consequences for shortcomings of which he or she was not even aware. The Board believes that the Merit Rules should encourage verbal

interaction between supervisors and employees, not make every conversation possibly subject to an adversarial grievance process.

> [E]mployee criticism, as with employee praise, is a normal incident of the working relationship between supervisors and those in their charge. Employee evaluation, important to both the employee and the employer, should not be hindered because of the important purposes it serves in improving both employee performance and employee satisfaction. . . . [T]he critical evaluation of employee performance is often a vital function of any supervisor or responsible administrator. An employer or supervisor must be free, to some extent, to point out an employee's failings, as with his or her successes. [This is an] appropriate practice in the employment context, and generally within an employer's prerogative.

*Nelson v. University of Maine System*, 923 F. Supp. 275, 282, 283 (D. Me. 1996).

The Board concludes as a matter of law that it does not have jurisdiction to decide a grievance over a verbal reprimand. The Board does not believe that a verbal reprimand amounts to a disciplinary measure under Merit Rule 12.1 which an employee can grieve by alleging that the employer did not have just cause.

## DECISION AND ORDER

It is this 15th day of May, 2008, by a unanimous vote of 4-0, the Decision and Order of the Board that the Grievant's appeal is denied.

Brenda J. Phillips
Chair

Martha K. Austin
Member

Joseph D. Dillon
Member

John F. Schmutz
Member

## APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee's being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
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> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
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> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
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> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: May 21, 2008

Distribution:
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Board Counsel

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